85-287

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

COURT HOUSE PLAZA COMPANY,
Petitioner,

v.

CITY OF PALO ALTO, ET AL.,
Respondents

On Petition From The Court of Appeal
Of The State of California, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

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August 18, 1985

QUESTIONS PRESENTED

1. Should this Court now resolve the division among the state courts and federal courts as to whether the fifth amendment to the United States Constitution requires a monetary remedy for inverse condemnation through excessive land-use regulation?

2. Whether the holding of the California Supreme Court, in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *affd., on other grounds*, 447 U.S. 255 (1980), which denied the remedy of damages for inverse condemnation, is still viable in light of subsequent rulings by this Court.

3. Whether the definition of "vested right" used by the California courts in this case satisfies the substantive due process requirements of the fifth and fourteenth amendments to the United States Constitution.

PARTIES: INDIVIDUAL RESPONDENTS

The individual parties not named as Defendants and Respondents in the caption of this Petition for Writ of Certiorari are STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen PETER R. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTIONAL GROUNDS 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT OF CERTIORARI 6

I. THE CALIFORNIA COURT OF APPEAL, RELYING UPON *AGINS V. CITY OF TIBURON*, 24 CAL.3D 266 (1979), *AFFD.* 447 U.S. 255 (1980) HAS RULED THAT DAMAGES ARE NOT AVAILABLE AS A REMEDY IN AN INVERSE CONDEMNATION SUIT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN DIRECT CONFLICT WITH THE DISSENTING OPINION IN *SAN DIEGO GAS & ELECTRIC CO. V. CITY OF SAN DIEGO*, 450 U.S. 621 (1981), DECISIONS OF OTHER STATE COURTS OF THE LAST RESORT, AND THE DECISIONS OF THE NINTH AND FIFTH CIRCUITS OF THE UNITED STATES COURT OF APPEALS 6

II. THE CALIFORNIA COURT OF APPEAL HAS DECIDED THAT PETITIONER HELD NO VESTED RIGHT IN PHASE TWO OF ITS PROJECT IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT ON THE DEFINITION OF VESTED, PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS 10

TABLE OF CONTENTS (Continued)

III. THIS CASE IS RIPE FOR ADJUDICATION IN THIS COURT. NO VARIANCE WAS NEEDED OR OBTAINABLE UNDER THE ORIGINAL ZONING OF PETITIONER'S PROJECT, AND NO INVERSE CONDEMNATION PROCEEDING FOR DAMAGES WAS OR IS AVAILABLE AND ADEQUATE UNDER CALIFORNIA LAW 15

CONCLUSION 16

CERTIFICATE OF SERVICE. 17

TABLE OF AUTHORITIES CITED

Federal Cases

Pages

American Savings & Loan Assoc. v. County of Marin, 653 F.2d 364 (9th Cir. 1981) 8,12

Court House Plaza Company v. City of Palo Alto, et.al., No. 81-404, 454 U.S. 1074, cert. denied, November 30, 1981. 4,13

Hernandez v. City of LaFayette, 643 F.2d 1188 (5th Cir. 1981, cert. denied, 455 U.S. 907 (1982), affd. after remand, 699 F.2d 734 (1983) 8

In re Air Crash In Bali, Indonesia on April 22, 1974, 684 F.2d 1301 (9th Cir. 1982) 8

Kaiser-Aetna v. United States, 444 U.S. 164 (1979) 12

Martino v. Santa Clara Valley Water District, 703 F.2d 1141 (9th Cir. 1983). 8

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 11,12,14

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 7,8,9,10

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, ___ U.S. ___, 105 S.Ct. 3108 (1985) 7,14,15

California Cases

Agins v. City of Tiburon, 24 Cal.3d 266 (1979), affd., 447 U.S. 255 (1980) 5,6,7,8,10

Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal.App.3d 484 (1982), appeal dismissed , U.S. , 104 S.Ct. 53 (1983) 10

Court House Plaza Company v. City of Palo Alto, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981) cert. denied, 454 U.S. 1074 (1981). 4,13

TABLE OF AUTHORITIES CITED (Continued)

OTHER CASES Pages

Burrows v. City of Keene, 432 A.2d 15 (N.H. 1981). 9

Eck v. City of Bismarck, 283 N.W. 2d 193 (N.D. 1979) 9

Ripley v. City of Lincoln, 330 N.W. 2d 505 (N.D. 1983) 10

Sheerr v. Township of Evesham, 184 N.J. Super. 11, 445 A.2d 46 (1982) 9

Zinn v. Wisconsin, 112 Wis.3d 417, 334 N.W. 2d. 61 (1983). .10

CONSTITUTION

United States Constitution

Fifth Amendment 1,7,8,10,13,14

Fourteenth Amendment 1,10

Article VI, Clause 2. 10

STATUTES

Federal

42 U.S.C. Section 1983. 8

City of Palo Alto

Title 18 Zoning (Various Sections) 4,15

Ordinance No. 2224 (The "P-C Ordinance"). . . 2,11,13,16

JURISDICTIONAL GROUNDS

The original complaint for damages in this action was filed on September 22, 1977 in the Superior Court of the State of California. A first amended complaint (Appendix A1) was filed on February 22, 1982. Defendants' demurrer and/or motion to strike petitioner's first amended complaint was granted on June 17, 1982 (Appendix A3).

Petitioner's notice of appeal to the California Court of Appeal was timely filed on August 16, 1982. The opinion of the California Court of Appeal, Sixth District (Appendix B1) was issued on May 3, 1985. Petitioner timely filed a Petition for Rehearing. The denial of the Petition for Rehearing (Appendix B2) by the California Court of Appeal, Sixth District, was filed on May 22, 1985.

A Petition for Review was filed with the California Supreme Court on June 12, 1985. The denial of the Petition for Review by the California Supreme Court was filed on July 31, 1985 (Appendix C1).

This Court has jurisdiction of this Petition under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment V (Appendix E1).
2. United States Constitution, Amendment XIV, Sections 1 and 5 (Appendix E2).

STATEMENT OF THE CASE

A. *History of the City's Regulatory Action.*

Petitioner Court House Plaza Company ("CHP") is a limited partnership and the successor to an earlier partnership that owned and undertook to develop the property at issue.

On December 28, 1964, the City of Palo Alto adopted a planned development zoning ordinance, Ordinance No. 2224 (the "P-C Ordinance") (Appendix E3) which allowed the construction of professional and commercial office space on CHP's Palo Alto property. The P-C Ordinance approved by incorporation CHP's complete plans for construction of a ten-story office building on the site. CHP's plans included detailed drawings illustrating the location, elevation, and floor plan of a proposed ten-story office building, an associated multi-story parking garage, and other site accoutrements such as landscaping.

The P-C Ordinance included a proposed development schedule. Under the development schedule, CHP was required to start construction of Phase One, consisting of the first four stories of the office building and certain levels of a parking garage, within two years of the City's approval of the P-C Ordinance. By October, 1976, CHP was to commence construction of the remaining six stories of the office building (Phase Two) as well as additional parking garage levels.

The development schedule was devised in order that CHP and the City could coordinate the completion of CHP's ten-story office building with the growth in demand for commercial office space that the City expected. Originally, economic feasibility was to dictate when ultimate completion would occur.

CHP began and timely completed the first four floors of its ten-story office building by August of 1967. In constructing that Phase One, CHP actually began physical construction of Phase Two.

The foundation and structural steel for the first four floors had to be constructed at great additional expense to carry the weight of the planned six additional floors for Phase Two. In addition, two extra elevator shafts and an interior smoke-proof tower were provided in the first four stories, even though they were only required for the additional six stories of Phase Two. Other systems such as the water, sewer, and electrical were all designed to accommodate both the first four stories of Phase One and the remaining six stories of Phase Two. In addition, the heating and ventilating system and the elevator machinery for the first four floors were placed in basement mechanical rooms at great added cost instead of on the roof. This was done so that the six stories could be added without interrupting services to the earlier-built four stories. CHP spent about $500,000 in 1967 on those improvements to accommodate Phase Two.

Upon leasing the first four stories, CHP ordered and had fabricated at a cost of approximately $450,000 two additional elevators and the structural steel needed to complete the six stories of Phase Two. In March of 1970, during fabrication of the elevators and steel, use and building permits for the additional six stories of Phase Two were issued. Erection of the structural steel and installation of the elevators for the additional six stories, however, did not take place because of inability to obtain construction financing at that time after issuance of the permits.

In 1973 a 50-foot height limitation was enacted for all buildings in Palo Alto except those in planned community (P-C) districts. Hence, in theory, CHP's property was exempt.

Well before expiration of the development schedule on October 31, 1976, CHP renewed its efforts to complete Phase Two. However, due to inaction and dilatory tactics by the City, CHP was unable to obtain use and building permits for the six additional stories; even though like building and use permits had earlier been granted.

Because of this inaction and numerous delays and obstructive acts by the City and its officials, CHP was forced to apply for a one-year extension of the development schedule in August of 1976, three months before the schedule would expire. At all relevant times section 18.68.080D (Appendix E4) of Palo Alto's Municipal Code provided that the Planning Commission could recommend extension of P-C development schedule for "good cause shown by the property owner in writing". CHP believed it had such good cause. In practice, the City had routinely granted all such requests for extension of P-C development schedules. In fact, based upon a letter written on May 23, 1968 by the City Attorney (Appendix F2), CHP reasonably expected that it could also obtain such an extension upon a showing of good cause. However, the Planning Commission refused to recommend an extension after being advised by Assistant City Attorney that changed circumstances such as the controversial 50-foot height ordinance could be considered in determining whether there was good cause.

On appeal the City Council denied CHP any extension. CHP felt it possessed good cause for an extension of the development schedule based not only upon economic circumstances that surrounded completion of Phase Two, but also upon the dilatory and obstructive acts of City officials.

In order to redress the failure of the City to reissue use and building permits for Phase Two and the failure to extend the development schedule, CHP filed a mandamus action (*CHP I*) in a California trial court that eventually resulted in an appellate decision in *Court House Plaza Company v. City of Palo Alto*, 117, Cal.App.3d 871, 173 Cal.Rptr. 161 (1981), *cert. denied*, 454 U.S. 1074 (1981). That case held that the City's denial of an extension of the development schedule and its failure to issue use and building permits for the additional six stories was neither unreasonable, arbitrary nor discriminatory. Thus the Court of Appeal upheld the City's decision.

Shortly after filing the mandamus action (*CHP I*) in February of 1977, CHP filed an independent action (*CHP II*) in the same trial court to preserve its rights to damages. Respondents were given an open-ended extension of time to answer the *CHP II* complaint, pending the outcome of the *CHP I* mandamus appeal.

After *CHP I* became final, Respondents finally responded to the *CHP II* complaint by demurring to it. The demurrer was granted with leave to amend.

CHP then filed its first amended complaint (Appendix A1) alleging inverse condemnation, violation of civil rights, and conspiracy and seeking damages. All federal causes of actions were reserved for hearing in a parallel United States federal district court action between these parties, U.S. District Court (N. Cal.) No. 81-404, 454 U.S. 1074 *cert. denied*, November 30, 1981 ("*CHP III*").

Respondents' second demurrer (Appendix A2) to the amended complaint was sustained without leave to amend. In its decision (Appendix A3) the trial court held that CHP was not entitled to compensable damages under the theory of inverse condemnation alleged in its second cause of action and the *CHP II* suit was barred by *res judicata*.

This was the determination from which CHP appealed. The California Court of Appeal for the Sixth District in its opinion (Appendix B1) affirmed the decision of the trial court and concluded under *Agins v. City of Tiburon*, 24 Cal.3d 266, 272-277 (1979). *affd. on other grounds*, 447 U.S. 255 (1980), that:

1. When excessive zoning regulation has deprived a landowner of substantially all reasonable use of his property, the landowner's remedy is not damages for inverse condemnation, but either an action in mandate or for declaratory relief. Appendix B1, p. B-4.

2. The prior mandamus action (*CHP I*) determined implicitly that the City had taken no vested property right from CHP to construct Phase Two of the office building on its property. *CHP I* is *res judicata*, even though CHP had originally sought a different form of relief there. Appendix B1, p. B-8.

A Petition for Review was filed with the California Supreme Court on June 12, 1985. The denial of the Petition for Review by the California Supreme Court was filed on July 31, 1985. (Appendix C1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE CALIFORNIA COURT OF APPEAL, RELYING UPON *AGINS V. CITY OF TIBURON*, 24 CAL.3D 266 (1979), *AFFD.* 447 U.S. 255 (1980) HAS RULED THAT DAMAGES ARE NOT AVAILABLE AS A REMEDY IN AN INVERSE CONDEMNATION SUIT UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, IN DIRECT CONFLICT WITH THE DISSENTING OPINION IN *SAN DIEGO GAS & ELECTRIC CO. V. CITY OF SAN DIEGO*, 450 U.S. 621 (1980), DECISIONS OF OTHER STATE COURTS OF THE LAST RESORT, AND THE DECISIONS OF THE NINTH AND FIFTH CIRCUITS OF THE UNITED STATES COURT OF APPEALS.

1. *Agins Incorrectly Eliminated All Actions for Inverse Condemnation Challenging Local Land-Use Decisions in California.*

In *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), *affd. on other grounds*, 447 U.S. 255 (1980) ("Agins"), the California court eliminated all actions for inverse condemnation challenging local land-use decisions.

Instead, the *Agins* court found actions for mandamus and/or declaratory relief to be constitutionally sufficient remedies for the aggrieved landowner. The complaint was dismissed for failure to state facts sufficient to constitute a cause of action.

While that narrow holding of dismissal was affirmed by this Court, this Court did not reach the question of remedy under the fifth amendment. "Because no taking has occurred, we need not consider whether a state may limit the remedies available to a person whose land has been taken without just compensation." 447 U.S. at 260.

Since *Agins* this Court has hesitated to address that question in a series of cases held not ripe for adjudication on their constitutional merits. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) ("San Diego G. & E.") (lack of final judgment below); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, ___ U.S. ___, *105 S.Ct. 3108 (1985)* ("*Hamilton Bank*") (failure to exhaust available state remedies).

2. *The Prohibition on Inverse Condemnation Damages is Contrary to Federal Law.*

Admittedly, this Court has not squarely decided whether a state court must entertain claims for monetary compensation, as opposed to declaratory and injunctive relief, in cases under the fifth amendment. However, this case presents that question squarely to this Court because Petitioner has received a final judgment and has unquestionably exhausted every administrative and judicial remedy now available in California.

In *San Diego G. & E., supra*, the four-justice plurality chose to leave the issue of monetary compensation undecided strictly for jurisdictional reasons (lack of final judgment below) under the peculiar procedural circumstances of that case. The four dissenters, who would have reached the merits of the case, concluded that the fifth amendment requires monetary remedies for *de facto* takings by police power regulation. Justice

Brennan, who authored the dissenting opinion in *San Diego G. & E.*, specifically so stated. Indeed, he went on to outline a measure of interim monetary damages to be applied in connection with invalidation of the offending regulation.

Justice Rehnquist, concurring with the plurality opinion, wrote separately and emphasized that he "would have little difficulty in agreeing with much of what is aid in the dissenting opinion . . . ," but that he disagreed with its conclusion that the court had jurisdiction to hear the case. 450 U.S. at 633-635.

In effect, therefore, a majority of five justices in *San Diego G. & E.* agreed that government must pay just compensation for the period commencing on the date that its regulation first effected the "taking" and ending on the date the government chooses to rescind or otherwise amend the regulation. Id., at 653 (Brennan, J., dissenting).

The federal courts sitting in California have read *San Diego G. & E.* as disapproving of *Agins*. The Ninth Circuit Court of Appeals, for example, reversed a summary judgment decision against a landowner suing a city and water district in California for damages under 42 U.S.C. section 1983 because the court felt that ". . . the present vitality of this aspect of *Agins* [the invalidation remedy] has been substantially undercut by Justice Brennan's dissenting opinion in *San Diego Gas and Electric Co. v. City of San Diego . . .*" *Martino v. Santa Clara Valley Water District*, 703 F.2d at 1141 (1983); see also, *American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364, 372 (9th Cir. 1981); *In re Air Crash In Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1311 n. 7 (9th Cir. 1981); *Hernandez v. City of LaFayette*, 643 F.2d 1188, 1198-1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *affd. after remand*, 699 F.2d 734 ('1983).

Yet uncertainty remains hanging over lower federal courts as to this Court's anticipated, but yet undelivered, opinion on remedies under the 'taking' clause of the fifth amendment. That uncertainty has become ominous by virtue of the Court's indica-

tion that, but for lack of finality, the issue would have been addressed in *Hamilton Bank, supra.*

3. *The Prohibition on Inverse Condemnation is contrary to the decisions of the Courts of last resort of other states.*

Other jurisdictions have rejected the California Supreme Court's ruling in *Agins.* The New Hampshire Supreme Court's decision in *Burrows v. City of Keene,* 432 A.2d 15 (N.H. 1981), for example, flatly rejected the rule of *Agins.* When the defendant City of Keene attempted to assert the defense that the developer could not recover damages for inverse condemnation but must be satisfied only with the remedies of mandamus and/or declaratory relief, the court stated that "we reject this approach out of hand." *Id.*, at 20. The New Hampshire court continued:

> We agree with Justice Brennan that it is always open to the governmental entity involved to rescind or repeal the offending regulation and thus avoid payment of damages for inverse condemnation from that point on [citation]. Until that is done, however, the owner's property has been taken during the interim and he is entitled to compensation for that taking. [citation]. Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens of accompanying "progress" upon individual land owners rather than on the public at large. The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side on the line, *San Diego Gas and Electric Co. v. City of San Diego, supra,* at 1308 n. 26 (Brennan, J. dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones.

Id. at 20. *See, also, Eck v. City of Bismarck,* 283 N.W.2d 193, 200-201 (N.D. 1979) (refusing to disallow all actions for inverse-condemnation damages). *Sheerr v. Township of Evesham,* 184

N.J. Super, 11, 445 A.2d 46, 53-54, 74-75 (1982) (awarding damages and apparently rejecting the California *Agins* decision).

Clearly, the present stance of the California state courts, on this constitutional issue is diametrically opposed to that of the dissent in *San Diego G. & E.*, many lower federal courts, and the courts of last resort of other states. *See Zinn v. Wisconsin*, 112 Wis.3d 417, 334 N.W. 2d 61, 73 (1983) (approving dissent in *San Diego G. & E.); Ripley v. City of Lincoln*, 330 N.W.3d 505 (N.D. 1983) (same).

Under the supremacy clause of the United States Constitution Article VI, clause 2, precedent of this Court should control the California Supreme Court's interpretation of the fifth amendment. However, until this Court takes a definitive stand on this issue, the courts of California will continue to stray from the requirements of constitutional law, and plaintiffs in California land-use cases will continue to be deprived of their constitutional rights and remedies. *See, e.g. Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 493-494 (1982), appeal dismissed 104 U.S. 53 (1983).

II. THE CALIFORNIA COURT OF APPEAL HAS DECIDED THAT PETITIONER HELD NO VESTED RIGHT IN PHASE TWO OF ITS PROJECT IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT ON THE DEFINITION OF VESTED PROPERTY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

1. *Petitioner held Vested Rights in Phase Two.*

The Court of Appeal agreed with the decision of the trial court in holding that Petitioner's rights in Phase Two of its project had not vested.

The Court of Appeal misinterpreted and misapplied controlling precedent of this Court.

The most significant precedent is *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). That decision recognized the chaotic state of the law on the 'taking' question. To help provide the courts with guidance as to what constitutes a taking and when a vested right should be recognized, this Court aritculated a test called the "reasonable investment-backed expectation test" consisting of three components:

1. The owner's reasonable reliance upon a previous regulatory condition or official course of conduct;

2. The owner's investment in an existing use which the regulation curtails; and

3. An unusually unbalanced distribution of benefits (upon others among the public) and of burdens (upon this and/or other owners) accomplished by the regulations. *See* 438 U.S. at 124-5.

In this case CHP possessed a reasonable investment-backed expectation in being allowed to complete Phase Two. CHP had expended almost one million dollars in reliance upon the City's earlier promises that Phase Two could be completed according to the P-C development schedule. The loss of this money, however, pales in comparison to such damages as lost profits on the rental income CHP would have received had the City not stopped CHP's project. Nowhere in the record below did the California Courts identify, weigh, or balance any benefit the city could expect to receive for precluding CHP from completing Phase Two. The record is only replete with the burden that CHP has been forced to bear.

Unlike the plaintiff in *Penn Central*, CHP had received an initial approval for development within the 'air space' above the four-story building in Phase I. Indeed, the City of Palo Alto, by virtue of the P-C Ordinance, was responsible for severing the 'air space' within Phase Two. Hence it is not CHP who has created an artificial division of the property into segments. The reasoning

of *Penn Central* leads to finding a 'taking' here. *American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364 (9th Cir. 1981).

Critical to this Court's decision was the fact that, while the City of New York could stop Penn Central from building a 50-plus story office building, the City of New York would still have allowed construction of a 20-story addition to the current building on the site. *Id.*, at 136-137. Moreover, the City would also have allowed Penn Central to build its proposed 50-story plus building on at least eight parcels in the vicinity of Penn Central's property. Here CHP has received no compensatory development rights at all for the air rights for the six additional stories.

The City of Palo Alto has, in contrast, entirely precluded CHP from building any additional stories. It also has not offered any form of compensation that could work as a set-off to the damage CHP suffered due to Palo Alto's reprehensible actions.

This Court has extended *Penn Central* to physical invasions by government.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), a Hawaii residential marina was privately developed by dredging and filling a pond. The federal government then declared the pond to be a navigable waterway and asserted public right of access. Applying the three-part *Penn Central* test, this Court found a taking. One of the key findings was the fact that the developer had asked the Corps of Engineers whether the dredging of an existing shallow channel would turn its private property into a navigable waterway. 444 U.S., at 168. The Corps said it would not. Thus, when the government attempted to assert its jurisdiction over the waterway at a later date, it had to pay compensation.

The parallel with the present case is clear. Just as the developer in *Kaiser Aetna* relied on the word of the Corps of Engineers, CHP relied on the past conduct and express assur-

ances of the City of Palo Alto that it would be able to proceed with Phase Two. Indeed, CHP relied upon the City's own P-C Ordinance. CHP relied on City assurances when it completed Phase One to accommodate Phase Two and also when preparing plans for Phase Two's additional six stories, purchasing the structural steel, and the two elevators for the same. CHP's rights were further vested when a building permit issued for Phase Two. The City could not renege after it knew CHP had spent nearly $1,000,000 in reliance on the City's assurances to complete Phase Two.

The definition of "vested rights" for the purposes of a "taking" analysis under the fifth amendment to the United States Constitution is an important federal question to which the conclusions of the California Courts have given a misguided answer. Unless this Court corrects the aberrant position of the California courts on this issue, plaintiffs in California land-use cases will continue to be deprived of their constitutional right to substantive due process.

2. *The Doctrine of Res Judicata Should Not Be Applied to Parrallel Actions which seek different remedies where one of the actions was a suit for mandamus which was decided on an incorrect analysis of "vested rights".*

The California Court of Appeal stated: "the prior appellate opinion shows that a central issue was whether the developer had acquired a vested right to building and use permits. (*Court House Plaza Co. v. City of Palo Alto, supra,* 117 Cal.App.3d 871, 884-887.)" Appendix B1, p. B-6.

So the erroneous conclusion of the California trial court in *CHP I* in regard to the "vested rights" question has been used to block any substantive review of the question of damages for inverse condemnation in this case.

CHP's right to damages for inverse condemnation was not and could not have been determined in *CHP I* since while that

mandamus action was pending, such a cause of action did not exist in California. As the California Court of Appeal itself noted in referring to *CHP I*: ". . . [d]amages were never prayed for in the petition nor did the trial court reach the issue of the availability of damages for inverse condemnation." Appendix A, slip opinion, pp. 10-11. Inconsistently with that perception, the California Court of Appeal proceeded to affirm the dismissal of CHP's complaint on the ground of *res judicata*.

This Court's reassertion of federal 'takings' law made possible the reactivation of *CHP II*. Every precedent in this Court cited in the Petition was handed down after the trial court's judgment in *CHP I* (except only *Penn Central*, decided a few months earlier).

Only by presuming that Petitioner's fifth amendment claim had been earlier adjudicated in *CHP I*, under the amorphous rubric of "vested rights," could the Court of Appeal have reached its decision with confidence. But, as stated above, the 'vested right' determination in *CHP I* did not derive from any constitutionally-sufficient 'taking' analysis. Hence any suggestion that *CHP I* gave Petitioner its day in court on the fifth amendment issue presented here cannot endure the test of history, truth, and legal analysis.

Any determination of Petitioner's "vested rights" in *CHP I* could not possibly constituted a 'taking' analysis complying with this Court's criteria. This Court's opinion in *Hamilton Bank* reiterated the two main factors in the analysis, as defined in *Penn Central*, 438 U.S., at 124, and subsequent decisions: ". . . this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Hamilton Bank*, ___, U.S. at ___, 105 S.Ct., at 3119. Nothing of the sort occurred in *CHP I*, because there the trial court ruled on the question of 'vested rights' mainly to fix the standard of review for mandamus. Nothing in the record before the Court

of Appeal in this case warrants any other conclusion. Evidence of a constitutionally-sufficient 'taking' analysis can nowhere be found.

A definitive statement by this Court as to the due process rights of landowners to damages for the loss of property defined "vested rights" in inverse condemnation suits is necessary in order to avoid the inequitable application of the doctrine of *res judicata* in this case.

Unless the judgment of the California Court of Appeal is reversed, Petitioner will never have an opportunity to present its claim for damages to any court disposed to recognize and to rule fairly on such a claim.

III. THIS CASE IS RIPE FOR ADJUDICATION IN THIS COURT. NO VARIANCE WAS NEEDED OR OBTAINABLE UNDER THE ORIGINAL ZONING OF PETITIONER'S PROJECT, AND NO INVERSE CONDEMNATION PROCEEDING FOR DAMAGES WAS OR IS AVAILABLE AND ADEQUATE UNDER CALIFORNIA LAW.

In this Court's recent opinion this Court stated that before a claim may be made the property owner must first have "... unsuccessfully attempted to obtain just compensation through procedures provided by the State for obtaining such compensation ..." *Hamilton Bank*, ____ U.S., at ____, 105 S.Ct., at 3121.

This Court went on to state that a 'taking' claim will be considered premature until the owner has exhausted any local variance procedures and has shown that any inverse condemnation procedure is unavailable or inadequate.

The present case complies with the dictates of the *Hamilton Bank* opinion. No variance procedure was available to Petitioner after the City Coucil's action. (Appendix E4 Section 18.90.090). The City Council denied finally any extension of the development schedule. No further relief was available from the City of

Palo Alto or the State of California. Because the P-C Ordinance had originally approved all physical parameters of both Phase One and Phase Two, Petitioner had no need to seek a variance for any aspect of the project, including the building's height. Petitioner needed only more time to complete Phase Two as approved and would not have needed that but for the delaying tactics of the City of Palo Alto.

No adequate inverse condemnation procedure is available in California since the California courts do not recognize damages as an appropriate remedy in this type of case, as discussed in the preceding sections of this Petition. Moreover, Petitioner had exhausted its equitable remedy in *CHP I*, in strict obedience with the existing, though constitutionally-infirm, procedures of the California courts. No greater effort to exhaust remedies can, or should be, demanded by a humane judiciary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FLEHR, HOHBACH, TEST,
ALBRITTON & HERBERT

By /s/ Harold C. Hohbach
Harold C. Hohbach

Counsel for Appellant

August 18, 1985

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF)
FRANCISCO)

Harold C. Hohbach, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for Petitioner in this cause; that on this 18th day of August, 1985, he mailed three copies of Petitioner's Petition for Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid to:

Diane M. Lee
City Attorney
250 Hamilton Avenue
Palo Alto, CA 94301

Fred Caploe
Williams & Caploe
1060 Grant St., Suite 201
P.O. Box 698
Benicia, CA 94510

and that he also mailed forty copies of Petitioner's Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

/s/ Harold C. Hohbach
HAROLD C. HOHBACH

SUBSCRIBED AND SWORN to before me this 18th day of August, 1985.

Witness my hand and official seal.

/s/ Nancy A. Davidson
NANCY A. DAVIDSON
NOTARY PUBLIC

My commission expires October 30, 1987

APPENDICES

APPENDICES

TABLE OF CONTENTS

Page

APPENDIX A

(1) First Amended Complaint For Inverse Condemnation, Deprivation of Constitutional Rights, and Declaratory Relief A-1

(2) Demurrer's to First Amended Complaint A-18

(3) Memorandum of Decision and Order After Hearing On Motion to Strike and Demurrer to the First Amended Complaint A-20

APPENDIX B

(1) Opinion of the California Court of Appeal, Sixth Appellate District B-1

(2) Denial of Petition For Rehearing to California Court of Appeal B-10

APPENDIX C

(1) Denial of Petition for Rehearing to California Supreme Court C-1

APPENDIX D

(1) Notice of Appeal to the Supreme Court of the United States D-1

APPENDIX E

(1) United States Constitution, Amendment V E-1

(2) United States Constitution, Amendment XIV Sections 1 and 5 ..... E-2

(3) Ordinance No. 2224 ..... E-3

(4) Zoning Code Sections of the City of Palo Alto E-8

APPENDIX F

(1) Inter-office Communication of City of Palo Alto of February 3, 1979 ..... F-1

(2) Letter of City of Palo Alto of May 23, 1968, by Donald G. Meaney, Assistant City Attorney F-2

APPENDIX A

(1) First Amended Complaint for Inverse Condemnation, Deprivation of Constitutional Rights, and Declaratory Relief

(2) Demurrers to First Amended Complaint

(3) Memorandum of Decision and Order after Hearing on Motion to Strike and Demurrer to the First Amended Complaint

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY, a limited partnership, Plaintiff, v. THE CITY OF PALO ALTO, a municipal corporation, STANLEY R. NORTON, BYRON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN J. BERWALD, ANNE R. WITHERSPOON, JOHN V. BEARS, Councilmen, PETER R. CARPENTER, MARY R. GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M. RENZEL, ANNE STEINBERG, Planning Commissioners, STAN J. NOWICKI, Chief Building Inspector, JAMES O. GLANVILLE, Zoning Administrator, NAPTHALI H. KNOX, Director of Planning and Community Environment, ROBERT K. BOOTH, JR., City Attorney and LOUIS B. GREEN, Assistant City Attorney, Defendants.	Civil No. P33070 FIRST AMENDED COMPLAINT FOR INVERSE CONDEMNATION, DEPRIVATION OF CONSTITUTIONAL RIGHTS, AND DECLARATORY RELIEF

Plaintiff alleges:

FIRST CAUSE OF ACTION

[Inverse Condemnation – United States Constitution]

(Parties to this Action)

1. Plaintiff, COURT HOUSE PLAZA COMPANY, is a limited partnership formed and existing under the California Limited Partnership Act (Corporations Code § 15500 *et seq.*) Plaintiff does business under the name of COURT HOUSE PLAZA COMPANY and has complied with the provisions of California law (Business and Professions Code § 17910 *et seq.*) for the filing and publication of a certificate stating such fictitious business name. Plaintiff is the successor-in-interest to California Lands Building Company, a California general partnership, the former owner of the property in question here until about October of 1971.

2. Plaintiff's principal place of business, and the property in question are located within, and the acts of Defendants described in this Complaint, all occurred within, the County of Santa Clara, California.

3. Plaintiff is the fee owner of real property located at 260 Sheridan Avenue, City of Palo Alto, County of Santa Clara, State of California.

4. Defendant, THE CITY OF PALO ALTO ("the CITY"), is now, and at all times pertinent to this action was, a municipal corporation organized and existing under the laws of the State of California as a charter city and located in the County of Santa Clara, State of California.

5. Defendants STANLEY R. NORTON, BRYON D. SHER, FRED S. EYERLY, ROY L. CLAY, KIRKE W. COMSTOCK, SCOTT T. CAREY, JOHN T. BERWALD, ANNE R. WITHERSPOON and JOHN V. BEAHRS were, on and before December 6, 1976, members of the City Council of the CITY.

   Defendants PETER F. CARPENTER, MARY GORDON, WILLIAM E. GREEN, JAY W. MITCHELL, EMILY M.

RENZEL nad ANNE STEINBERG were, on and before December 6, 1976, members of the Planning Commission of the CITY.

Defendants STANLEY J. NOWICKI, JAMES O. GLANVILLE, NAPHTALI H. KNOX, ROBERT K. BOOTH, JR., and LOUIS B. GREEN were, on or before December 6, 1976, respectively, the Chief Building Inspector, the Zoning Administrator, the Director of Planning and Community Environment, the City Attorney, and the Assistant City Attorney of the CITY.

6. At all times pertinent to this action, Defendants, individually and collectively, acted in concert to cause Plaintiff's injury as described in this Complaint; and the individual Defendants served as the agents and/or employees of Defendant CITY and of each other and at all times acted within the scope of such agency and employment.

[History of the Project: Acquisition of Vested Rights]

7. The CITY adopted Ordinance No. 2224 on December 28, 1964 (the "P-C Ordinance"). The P-C Ordinance placed Plaintiff's property in a "P-C" zone; that is, a zone for professional and commercial office use. The P-C Ordinance also approved (by incorporation) Plaintiff's development plans for ten-story office building; and these plans consisted of detailed drawings showing the location, elevation, and floor plan of the building, the related parking garage, and other details of the site development (the "Project").

8. The P-C Ordinance contained certain conditions:
   (a) "Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan."
   (b) Off-street parking space shall be provided, the number of spaces to be at the ratio of one for each 144

square feet of floor area in the ground floors and one parking space for each 288 square feet of floor space in the upper floors.

(c) The ten-story building shall be built according to a development schedule providing that, in Phase 1, "start of construction of the four-story office building" and the "parking garage" shall be "within two years of Council approval" and, in Phase 2, "start of construction of the fifth to and including the tenth story" and "additional levels of the parking garage" shall be "by October 31, 1976."

The development schedule contained in the P-C Ordinance rested upon an understanding between Plaintiff and City officials that the phasing of the Project would enable Plaintiff to complete the Project when the demand for office space in the CITY made completion economically feasible.

9. Soon after adoption of the P-C Ordinance Plaintiff prepared architectural plans for the entire ten-story building. On June 14, 1966, the CITY issued a building permit for Phase 1. On January 17, 1966, the CITY issued a use permit for Phase 1. In reliance upon these permits and with the guidance of its architectural plans for the ten-story building, Plaintiff commenced construction of Phase 1, within the two-year period required under the development schedule of the P-C Ordinance, and completed construction in about August of 1967.

10. The first four stories of the building completed in Phase 1 incorporated structural elements designed to support the remaining six stories in Phase 2. Among these structural elements, costing over $450,000, were the following:

(a) A foundation capable in sustaining all ten floors;

(b) Structural steel of sufficient strength to support the remaining six floors;

(c) Heating and cooling equipment placed in the basement instead of upon the roof, in order to permit construction of the remaining six floors without interrupting service to the first four floors;

(d) Two additional elevator shafts to accommodate elevators for the remaining six floors;

(e) An interior smokeproof tower for fire safety purposes, not necessary in a four-story building;

(f) Extra electrical, water and sewage capacity permitting hook-up of facilities on the remaining six floors.

11. In so completing Phase 1 and thereby commencing actual construction of Phase 2, Plaintiff acquired a vested right to complete Phase 2 under regulations in effect on the date that the P-C Ordinance was adopted. Plaintiff reasonably expected that it might complete Phase 2 under such regulations based upon the conduct of Defendants in issuing building and use permits for commencement of the Project; and Plaintiff's investment in the Project in 1966 and succeeding years resulted from that reasonable expectation.

[The Parking Problem]

12. Because the parking garage contemplated by the P-C Ordinance would have interfered with the CITY's plan for realignment of Page Mill Road, the CITY did not require Plaintiff to begin construction of the garage within the two years provided in the development schedule. On December 13, 1965 the CITY adopted Resolution No. 3860 requiring Plaintiff to provide 107 off-street parking spaces instead of the garage. The CITY thereby acknowledged its responsibility for impeding Plaintiff's construction of the parking garage and indicated officially its willingness to cooperate with Plaintiff in resolving the parking problem.

13. Thereafter CITY engaged in a course of conduct which effectively aggravated the parking problem, prevented its resolution, and thwarted Plaintiff in its efforts to satisfy

the condition of the P-C Ordinance regarding parking spaces. The CITY's course of conduct included, among others, the following acts:

(a) The CITY failed to resolve with the County of Santa Clara the design of the Page Mill Road realignment.

(b) On December 11, 1967, the CITY adopted Resolution No. 4055 extending time for the commencement of construction of the parking garage by one year. On May 6, 1968 the CITY adopted Resolution No. 4113, rescinding Resolution Nos. 3860 and 4055, substituting 107 attendant parking spaces on the surface in place of a parking garage, and allowing until October 31, 1976, for Plaintiff to commence construction of the parking garage.

(c) By agreement with the County of Santa Clara, the CITY consented to the County's acquiring, under a final order of condemnation entered on August 21, 1970, a portion of the land Plaintiff intended to use for construction of the parking garage, making its construction impossible.

(d) In connection with the foregoing condemnation, the CITY sold the County, and the County conveyed to Plaintiff as partial compensation, a small piece of land supposedly usable for the parking garage, but known to the CITY not to be usable under CITY's own requirements for design and construction.

(e) On March 31, 1975, the CITY resolved to acquire six parcels of land (the "Power parcels") for eventual development by the CITY for low-and moderate-income housing. At the time of this Resolution the CITY knew that Plaintiff had once invested funds in acquiring an option to purchase, and later in purchasing, the Power parcels as a means of resolving the parking problem. Although no longer the owner after 1973, Plaintiff remained interested in using the Power parcels for parking for the Project.

By these and other acts the CITY defeated Plaintiff's reasonable expectation that the CITY would with Plaintiff cooperate to satisfy the parking requirements for the Project before October 31, 1976.

[City's Dilatory and Arbitrary Administrative Acts]

14. In the Fall of 1968 Plaintiff completed construction drawings for Phase 2. The demand for office space then justified completion of Phase 2. In October of 1969 Plaintiff arranged financing for construction, directed its general contractor to commence the placement of construction subcontractors for the remainder of Phase 2, and particularly for structural steel and elevators for the six-story addition.

15. Plaintiff applied for a building permit on December 1, 1969. Instead of issuing a building permit promptly according to the regulations fixed by the P-C Ordinance, Defendants arbitrarily insisted that the smokeproof tower shown in the construction plans did not comply with the CITY's Building Code as amended after the P-C Ordinance. This dispute between Plaintiff and Defendants was not resolved until after the Assistant City Attorney ruled that Plaintiff had acquired vested rights in a ten-story office building, to be completed with an interior smokeshaft and without a fire sprinkler system, under the P-C Ordinance. The CITY finally issued the building permit on February 16, 1970.

16. Plaintiff applied for a use permit on February 13, 1970. Again Defendants arbitrarily objected to this application on the ground that the ten-story building, when completed, would be fourteen feet higher than the building shown in the drawings incorporated into the P-C Ordinance, even though Defendants knew that the P-C Ordinance required building heights to be only substantially as indicated on the approved Development Plan." The fourteen-foot height difference derived from the need for more space

between the floors to accommodate heating and ventilation equipment. The first four floors built in Phase 1 had already included the extra spacing. Because the CITY's Zoning Administrator objected to the difference in height, Plaintiff was required to request the CITY's Planning Commission to overrule the Zoning Administrator. On March 30, 1970 the City Council approved the Planning Commission's favorable ruling and issued the use permit, thereby ruling officially that the fourteen-foot height difference substantially complied with the P-C Ordinance.

17. While the CITY so delayed in issuing building and use permits to Plaintiff for the completion of Phase 2, the CITY also approved, on September 22, 1969, the nearby Palo Alto Square Project consisting of two ten-story office towers competing directly with Plaintiff's Project. The Palo Alto Square Project created a surplus of professional and commercial office space in the vicinity and so rendered the completion of Phase 2 by Plaintiff not viable economically for several years under then-prevailing business and financial conditions.

18. Notwithstanding its own financial difficulties and the saturated market for office space, Plaintiff again applied for a use permit to complete Phase 2, following the expiration of the use permit issued on February 13, 1970. Plaintiff's new application was filed on February 27, 1973 and requested a use permit identical to the one issued in 1970. Despite the fact that the City Council had already declared officially that the fourteen-foot height difference complied substantially with the P-C Ordinance, the CITY's Zoning Administrator indicated his intent to deny the new application because of that difference. In the face of this arbitrary objection, Plaintiff withdrew this application on March 30, 1973.

19. In September of 1973 the CITY adopted an interim Ordi-

nance No. 2745 limiting the height of new structures to fifty feet. The CITY incorporated this fifty-foot height limit into its new comprehensive plan in 1976.

20. In late 1975 the market for professional and commercial office space finally improved. The competitive Palo Alto Square Project was then almost completely leased. The renewed demand for office space and the availability of construction financing combined to render the completion of Phase 2 of the Project economically feasible once again.

21. In September of 1975 Plaintiff renewed discussions with Defendants regarding the completion of Phase 2. In response, Defendants resumed a course of conduct intended to delay Plaintiff, prevent completion of Phase 2, deprive Plaintiff of its vested rights, and to frustrate Plaintiff's reasonable investment-backed expectation that it could complete the Project under the P-C Ordinance and the regulations in effect when the P-C Ordinance was adopted. Among the acts comprising such course of conduct were the following:

    (a) After Plaintiff applied on June 30, 1976 for a change in the P-C zone to resolve the parking problem, the CITY's Zoning Administrator unreasonably objected to such application on the ground that it included land not owned by Plaintiff and for which Plaintiff requested contingent P-C zoning. Consequently, Plaintiff acquired the described land on September 11, 1976. Notwithstanding Plaintiff's expenditures of time, money, and personal efforts the zone-change application was never finally processed by the CITY before October 31, 1976, the end of the development schedule under the P-C Ordinance.

    (b) In the face of objections to its zone-change application, Plaintiff applied for a three-year extension of the development schedule on the suggestion of the Zoning Administrator. The Planning Commission de-

nied this extension on August 25, 1976, despite the fact that Section 18.68 of the CITY's Municipal Code provides that an extension of a development schedule may be recommended by the Planning Commission "for good cause shown by the property owner in writing." Plaintiff appealed the denial to the City Council, and the Council placed the appeal on its agenda. On the advice by the Mayor of the CITY and other council-members that the appeal would prove too controversial, Plaintiff withdrew the appeal on September 11, 1976.

(c) On August 27, 1976 Plaintiff applied for another use permit for the same ten-story building for which the use permit had issued in 1970. On August 31, 1976 Plaintiff also applied for a building permit, submitting the same plans submitted to the CITY in 1969. The City's Zoning Administrator and Building Inspector refused to act on either of these applications, notwithstanding the fact that Plaintiff then possessed a right to obtain the use and building permits described in the applications pursuant to the P-C Ordinance.

(d) After Plaintiff requested on October 1, 1976 a one-year extension of the development schedule, Defendants again sought to impose upon Plaintiff's request regulations adopted after the P-C Ordinance, in particular the California Environmental Quality Act of 1973. On October 27, 1976 the Planning Commission denied the request for one-year extension and, at the same time, continued the still-pending zone-change application. Plaintiff appealed the denial of the extension of the City Council. On December 6, 1976 the City Council denied the appeal, thereby finally ruling that the development schedule ending on October 31, 1976 would not be extended.

(e) The CITY never issued another building or use permit for completion of Phase 2. The City, in failing to is-

sue such permits, relied upon grounds not authorized by the P-C Ordinance but imposed by regulations adopted subsequently thereto.

22. Plaintiff demonstrated, as required by Section 18.68 of CITY's Municipal Code, "good cause" for the one-year extension. Such good cause consisted in the history of the Project described above. As early as May 23, 1968, when the City Attorney wrote to Plaintiff concerning the availability of extensions to a development schedule, Plaintiff formed the reasonable expectation that, because the CITY had in fact customarily granted such extensions to other applicants, Plaintiff would also be granted an extension upon its request for good cause shown.

23. During the course of the history of the Project described above, Plaintiff invested these funds in the Phase 2 of the Project:
    (a) $450,000 for the structural elements incorporated in Phase 1 as part of the construction of Phase 2.
    (b) More than $65,000 for the preparation of architectural plans for the remaining six stories of the building.
    (c) More than $450,000 for the fabrication of structural steel and elevators for the remaining six stories, expended in good faith reliance on the timely processing of Plaintiff's application for a building permit finally issued after delays on February 16, 1970.
    (d) More than $20,000 for the preparation of revised plans and specifications to comply with the 1973 Uniform Building Code adopted in Palo Alto, in good-faith effort to compromise with the CITY, and an additional $5,000 or more in legal fees in connection with hearings before the Planning Commission and City Council.
    (e) In excess of $10,000 for parking studies and revised parking plans submitted to the Planning Commission.
    (f) $20,000 for the purchase of the six Power parcels to solve the parking needs for the ten-story building.

(g) $87,000 for acquisition of the Pierson parcel to overcome the CITY's objection to Plaintiff's zone-change application in September of 1976.

(h) In excess of $160,000 in total for parcels located at 228 Sheridan Avenue, 230 Sheridan Avenue, 320 Sheridan Avenue, and 2660 Park Boulevard, all near the Project, as possible sites for parking.

The above items constitute special damages suffered by Plaintiff as a result of Defendant's preventing completion of Phase 2. Plaintiff has also suffered additional special damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

24. In addition, Plaintiff has suffered general damages in amounts not now known, including, but not limited to, the following:

(a) Loss of time by, and inconvenience to, its partners and the partners of its predecessor general partnership.

(b) Loss of profits from the existing four-story building.

(c) Loss of profits from the remaining six stories of the building which Plaintiff has a right to complete.

(d) Loss of increased appreciation in the four-story building and the remaining six stories together with the parking garage as a complete, integrated project.

Plaintiff has also suffered additional general damages, the full nature and extent of which Plaintiff does not know, but will allege and prove at the appropriate time.

25. By their conduct Defendants have appropriated, and taken without payment of just compensation, Plaintiff's property as described in paragraphs 23 and 24 preceding as well as the air-space above the existing four-story building, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND CAUSE OF ACTION

[Inverse Condemnation–California Constitution Art. 1, § 19]

26. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations contained in paragraphs 1 through 24, inclusive, of this Complaint.

27. By their conduct Defendants have confiscated, appropriated, and taken without payment of just compensation Plaintiff's property as described in paragraphs 23 and 24 above as well as the air-space above the existing four-story building; and such taking and/or damaging of property violates Article 1, § 19 of the Constitution of the State of California.

28. Plaintiff is entitled to recover its reasonable costs, disbursements, and expenses, including attorney's and expert fees, pursuant to Section 1036 of the California Code of Civil Procedure.

THIRD CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law Under the Fourteenth Amendment, U.S. Constitution]

29. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

30. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other applicants upon a showing of good cause under Section 18.68 of the City's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying to Plaintiff equal protection under the laws and depriving Plaintiff of its rights to due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

31. In seeking to apply to the Project regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Fourteenth and Fifth Amendments to the Constitution of the United States.

FOURTH CAUSE OF ACTION

[Denial of Equal Protection and Due Process of Law under Art. 1, § 7 of the California Constitution]

32. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 24, inclusive, of this Complaint.

33. In denying Plaintiff an extension of the development schedule contained in the P-C Ordinance, while routinely granting extensions to other property owners upon a showing of good cause under Section 18.68 of the CITY's Municipal Code, Defendants have unlawfully discriminated against Plaintiff, thereby denying Plaintiff equal protection under the laws and depriving Plaintiff of its right to due process of law in violation of Article 1, Section 7 of the Constitution of the State of California.

34. In seeking to apply requirements created by regulations adopted after the P-C Ordinance and after Plaintiff had acquired a vested right to complete Phase 2 under the P-C Ordinance and regulations in effect at the time of its adoption, Defendants have deprived Plaintiff of its right to substantive due process of law in violation of the Constitution of the State of California.

FIFTH CAUSE OF ACTION

[Deprivation of Constitutional Rights–Federal Civil Rights Act]

35. Plaintiff refers to, incorporates herein by reference in their

entirety, and realleges the allegations of paragraphs 1 through 25 and paragraphs 29 through 31, inclusive, of this Complaint.

36. Through their conduct as described above, Defendants have, under color of state law and municipal ordinances and regulations, deprived Plaintiff of its rights, privileges, and immunities secured by the Constitution of the United States and, in particular, the Fifth and Fourteenth Amendments thereto, in violation of Sections 1981 and following of Title 42 of the United States Code.

37. For such violation Plaintiff is entitled to recover special and general damages as described in paragraphs 23 and 24 of the First Cause of Action.

38. As an alternative to such special and general damages, Plaintiff is entitled to equitable relief to restore the deprivation of its rights, privileges, and immunities by Defendants. Such equitable relief consists in a mandatory injunction from this Court directing Defendants to permit Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and regulations in the effect at the time of its adoption, without further discretionary approvals by the CITY. In addition to such relief, Plaintiff is entitled to interim damages actually suffered during the period in which Defendants prevented Plaintiff from completing Phase 2; and Plaintiff asks leave to allege the amount of such damages and to prove the same when the amount becomes known.

SIXTH CAUSE OF ACTION

[Declaratory Relief]

39. Plaintiff refers to, incorporates herein by reference in their entirety, and realleges the allegations of paragraphs 1 through 38, inclusive, of this Complaint.

40. An actual controversy has arisen now exists between the Plaintiff, on the one hand, and Defendants, on the other

hand, concerning their respective rights and duties in connection with the Project. Plaintiff contends that it has the right either

(a) to complete Phase 2 under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by the CITY and, in addition, to receive full compensation for actual damages suffered during the period in which the CITY prevented completion of Phase 2 or, in the alternative,

(b) to receive full compensation for all special and general damages heretofore suffered by Plaintiff as a result of Defendant's conduct described above.

41. Plaintiff is informed and believes, and alleges on the basis of such information and belief, that Defendants do not accept Plaintiff's contention but take a contrary position.

42. Plaintiff desires an immediate declaration of its rights in the Project. Such declaration is necessary and appropriate in order to resolve the controversy between Plaintiff and Defendants and to eliminate the injury previously suffered, and still being suffered, by Plaintiff so long as Defendants prevent Plaintiff from completing Phase 2 of the Project.

WHEREFORE Plaintiff prays for judgment against Defendants, and each of them, as follows:

1. For the special damages described in paragraph 23 above according to proof.

2. For the general damages described in paragraph 24 above according to proof.

3. A declaration of the respective rights, duties and obligations of the parties.

4. Plaintiff's reasonable attorneys' fees in this action.

5. Costs arising from the prosecution of this action.

6. Interest as provided by law and determined by this Court on all items of special and general damages requested in paragraphs 1 and 2 of this prayer.

7. For such other, further and additional relief as this Court may deem appropriate.

In the alternative, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. Equitable relief in the nature of a mandatory injunction allowing Plaintiff to complete Phase 2 of the Project under the P-C Ordinance and the regulations in effect at the time of its adoption without further discretionary approvals by CITY.

B. Interim damages in the amount to be proven at trial for losses, costs, and expenses incurred by Plaintiff during the period in which Defendants prevented the completion of Phase 2 of the Project.

C. Costs arising from the prosecution of this action.

D. Plaintiff's reasonable attorneys' fees in this action.

E. Interest as provided by law and determined by this Court on all of the losses, costs and expenses described in paragraph B of this alternative prayer.

F. For such other, further and additional relief as the Court may deem appropriate.

Dated: February 26, 1982.

BERLINER, COHEN & BIAGINI

By /s/
JEFFREY P. WIDMAN
Attorneys for Plaintiff

ROPERS, MAJESKI, KOHN, BENTLEY,
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84 West Santa Clara Street
San Jose, CA 95113
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Attorneys for Defendants
THE CITY OF PALO ALTO and
EACH INDIVIDUALLY NAMED DEFENDANT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY, a limited partnership,	) Civil No. P33070
Plaintiff,	) DEMURRERS TO
vs.	) FIRST AMENDED
	) COMPLAINT
THE CITY OF PALO ALTO, a municipal corporation, et al.,	) Date: April 26, 1982
	) Time: 9:30 a.m.
	) Dept.: One
Defendants.	) Est. Length of Hearing
	) 30 mins.

DEMURRERS

Comes now defendants THE CITY OF PALO ALTO and each individually named defendant and demur generally and specially to the first amended complaint as follows:

I

The first amended complaint, and each purported cause of action therein, fails to state facts sufficient to constitute any valid cause of action against any defendant.

II

The first amended complaint, and each purported cause of action therein, is uncertain in that it cannot be determined which cause of action, if any, is directed against any of the individually named defendants.

WHEREFORE, defendants pray that foregoing demurrers be sustained, that plaintiff recover nothing by its first amended complaint, that defendants be awarded judgment in their favor including costs of suit herein incurred, and for such other relief as the Court deems just and proper.

Dated: April 9, 1982. ROPERS, MAJESKI, KOHN, BENTLEY, WAGNER & KANE

By

Attorneys for Said Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

COURT HOUSE PLAZA COMPANY,	)	No. P 33070
	)	
Plaintiff,	)	MEMORANDUM OF
	)	DECISION AND
vs.	)	ORDER AFTER
	)	HEARING ON MO-
THE CITY OF PALO ALTO,	)	TION TO STRIKE
	)	AND DEMURRER TO
Defendant.	)	THE FIRST AMENDED
	)	COMPLAINT

The plaintiff has notified the Court of a reservation of the claims arising under the United States Constitution and the Federal Civil Rights Act. This Court will therefore defer any adjudication with regard to the plaintiff's first, third, fourth and fifth causes of action pending outcome of Case No. C-81-4357-SZ currently filed in the United States District Court for the Northern District of California. Of necessity, the sixth cause of action requesting declaratory relief must await that litigation's outcome.

There remains only the plaintiff's second cause of action which is subject to the defendant's motions. The second cause of action basically seeks damages for inverse condemnation. The plaintiffs allege that they were prevented from constructing six additional floors to an existing four-story building because of a change in the zoning regulations by the City of Palo Alto.

The original plan for the building was a two-phase construction schedule and it is contended that the actions of the defendant City substantially deprived the plaintiff of full use of their property and that therefore the City should respond in damages under a theory of inverse condemnation.

Defendants have requested the Court to take judicial notice of the decisional law in *Court House Plaza vs. The City of Palo Alto* 117 CA3d 871 (1981) in which the Court held that plaintiff was not entitled to compensable damages under a theory of inverse condemnation. Such damages would include any that flow from interference with the use of air space.

Accordingly, the demurrer to the second cause of action is sustained on the grounds that that cause of action is barred by res judicata. Since there is no basis for an amendment, the demurrer is sustained without leave to amend.

DATED: June , 1982.

DAVID W. LEAHY
Judge of the Superior Court

APPENDIX B

(1) Opinion of the California Court of Appeal, Sixth Appellate District

(2) Denial of Petition for Rehearing to California Court of Appeal

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COURT HOUSE PLAZA CO.,	) A019076
	)
Plaintiff and	) (Santa Clara County
Appellant,	) Super.Ct.No.
	) P 33070)
-vs.-	)
	)
CITY OF PALO ALTO, et al.,	)
	)
Defendants and	)
Respondents.	)

Plaintiff Court House Plaza Co. (developer) appeals from a judgment of dismissal following the sustaining without leave to amend of a demurrer on grounds of res judicata interposed by the defendant City of Palo Alto (City). The developer concedes that this action arises from "the same historical set of facts" as did its prior mandamus action against the City, wherein the judgment denying it relief was affirmed on appeal in *Court House Plaza Co.* v. *City of Palo Alto* (1981) 117 Cal.App.3d 871. The critical question in this appeal is: does that judgment bar the developer from seeking damages in inverse condemnation based on the same actions by the City? The trial court so decided, after taking judicial notice of the mandamus petition in that action, the detailed findings of fact and conclusions of law, and the appellate opinion. We agree with the court's decision.

THE DEMURRER

As explained in *Carrol* v. *Puritan Leasing Co.* (1978) 77 Cal.App.3d 481, 486: "It is now settled that a court may take

judicial notice of the official acts or records of any court in this state and any state of the United States. (Evid. Code, § 452.) Pursuant to this authority, a trial court may take notice of the prior judgment in deciding whether to sustain a demurrer based upon res judicata. (*Flores* v. *Arroyo* (1961) 56 Cal.2d 492, 496 . . . .) In analyzing a demurrer based upon res judicata the court will take judicial notice of a prior judgment, whether or not pleaded, provided only that (1) the court has been correctly apprised of the judgment, and, (2) the plaintiff is given adequate notice and opportunity to be heard as to the effect of the judgment. (*Flores* v. *Arroyo, supra,* at p. 496; Evid. Code, § 452, subd. (d), § 453.)"

On demurrer, the court is not required to assume the truth of allegations which contradict what is judicially noticed. (*Saltares* v. *Kristovich* (1970) 6 Cal.App.3d 504, 510, and cases there cited.) Numerous allegations in the amended complaint contradict the findings made in the prior action, but they need not be detailed to resolve this appeal.

FACTUAL SETTING

The "same historical set of facts" is essentially: (1) in December 1964 the City passed an ordinance providing for the construction by the developer of a ten-story building in two phases, with phase one consisting of a four-story building to be commenced before December 1966, and phase two consisting of the remaining six stories to be commenced before October 31, 1976; (2) the developer completed construction of phase one under permits for phase one by August 1967, "overbuilding" the first four stories at a cost of about $450,000 (e.g., by using stronger steel for a foundation) in anticipation of adding six more stories; (3) the developer also expended more than $450,000 for fabricating steel and elevators for the remaining six stories[1];

[1]The developer alleges this expenditure was made in reliance on the issuance of building and use permits for phase two (which subsequently expired). The trial court in the first action found that these obligations were undertaken in advance of issuance of the permits and before the developer had financing, which was why the permits expired.

(4) the City precluded construction of phase two in a number of ways, but most significantly by denying the developer's August and October 1976 applications for an extension of the development schedule and August 1976 requests for building permit and a use permit.

INVERSE CONDEMNATION

The first action, styled a petition for ordinary and administrative mandamus, was filed on May 23, 1977. This second action was filed September 22, 1977, although the parties apparently delayed litigation pending the outcome of the mandamus action. After a demurrer was sustained to the original complaint in this second action with leave to amend, an amended complaint was filed February 26, 1982, which purported to state six causes of action. Our concern is only with the second cause of action in inverse condemnation because in response to the City's demurrer and motion to strike the amended complaint, the developer filed a "notice of reservation of federal claims" on May 3, 1982, which conditionally withdrew all federal causes of action for resolution in a pending federal action filed December 3, 1981. (We judicially notice (Evid. Code, § 459) that on June 4, 1982, the federal district court dismissed the federal claims based on the res judicata effect of the earlier action, which dismissal was upheld by the Ninth Circuit Court of Appeal on May 2, 1983.)

The cause of action with which the plaintiff hopes to proceed in this action seeks damages for inverse condemnation under the California Constitution. Inverse condemnation theory requires compensation of an owner whose private property has been "taken or damaged for public use." (Cal. Const., art. I, § 19; *Bauer* v. *County of Ventura* (1955) 45 Cal.2d 276, 282-283; *Tilem* v. *City of Los Angeles* (1983) 142 Cal.App.3d 694, 701-702.) As explained in *Tilem, supra,* at page 702: "The concept of 'taking' has with time changed from the notion of a physical seizure to that of a diminution of the owner's rights

and attributes of ownership . . . . [¶] Accordingly, the rule has developed that a cause of action for inverse condemnation arises from a governmental invasion or appropriation of a valuable property right which directly and specifically affects the landowner to his injury. [Citations.]" There the property owner was compensated in part for loss of the ability to develop a vacant parcel caused by the City's unreasonable precondemnation activity. (*Id.*, at p. 704.) The property right involved there and here for which compensation in inverse condemnation is sought is clearly a right to develop property by building on it and presumably to profit from the development.

Case law had addressed the propriety of inverse condemnation claims based on conduct similar to the City's before the developer filed these actions. *Selby Realty Co.* v. *City of San Buenaventura* (1973) 10 Cal.3d 110, 128, determined that the denial of a building permit did not give rise to a cause of action in inverse condemnation, but that it should be challenged in administrative mandate. When the mandate action and this action were filed, *HFH, Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508, 513-514 had determined that a zoning action which merely reduced the market value of a landowner's property did not give rise to a cause of action in inverse condemnation, although it could be challenged in mandamus. *HFH, Ltd., supra,* left for another day the question whether inverse condemnation recovery was available when the landowner was deprived of substantially all use of his property. (*Id.*, at p. 518, fn. 16.) The answer was provided, of course, by *Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 272-277, which determined that, under both the federal and state Constitutions, a property owner's remedy when excessive zoning regulation had deprived him of substantially all reasonable use of his property was not damages for inverse condemnation, but either an action in mandate or for declaratory relief.

RES JUDICATA

The developer contends that the instant action does not involve the same "primary right" at issue in the mandate action. It is aware that res judicata analysis is concerned with determination of primary rights. In *Slater* v. *Blackwood* (1975) 15 Cal.3d 791, an injured nonowner guest in a car had challenged the guest statute which limited recovery against a driver in her first action and lost on appeal. Subsequently in another case, the guest statute was held unconstitutional. (*Id.*, at p. 794.) She then brought a second action, but the court held that the change in the law was no basis for reviving her adjudicated negligence cause of action, because the same primary right had been determined in the first lawsuit and was res judicata, although different legal theories were presented therein. (*Id.*, at pp. 795-796; accord *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 257.)

The developer's argument can prevail only if the property right to be compensated by inverse condemnation damages was not involved in the prior mandate proceeding. While the developer is aware that our concern is whether different primary rights are involved in this action compared to the mandamus action, it apparently prefers not to characterize the rights or the difference. On appeal, the developer characterizes the prior action as having involved "the failure of a city to issue use and building permits or grant an extension of a development schedule" or a limited "question of vested rights" or only whether the City abused "its discretion in denying an extension of the development schedule." The developer attempts to contrast those issues with the primary right at issue in this case, which was described in the opening brief as "a vested right for whose taking compensation must be awarded," more particularly, the lost investment involved in overbuilding phase one and anticipating phase two and the lost profits which completion of phase two represented. Challenged by the City's brief to identify the primary right at issue here more specifically, the developer's reply brief char-

acterizes it as the City's depriving the developer of all property rights in its air space above four stories and the use of the steel and elevators constructed for phase two.

We review the pleadings and findings in the prior action to establish what issues were determined. (*Page* v. *Garver* (1907) 5 Cal.App. 383, 386.) As the City points out a taking was alleged in order to justify mandate in the prior petition. The relief sought in the mandate proceeding was to compel the City to alternatively grant building and use permits or at least an extension of three years in the development schedule. Either result would vindicate the developer's right to develop property by building on it and presumably to profit from the development.

The prior appellate opinion shows that a central issue was whether the developer had acquired a vested right to building and use permits. (*Court House Plaza Co.* v. *City of Palo Alto, supra,* 117 Cal.App.3d 871, 884-887.) The trial court's conclusions of law repeatedly rejected the notion that the developer acquired any vested rights (conclusions nos. 3, 10, 12, 13). The developer misstates the record in asserting that the only importance of that contention in the prior action was to determine the scope of administrative review in the trial court. That was one, but not the only, application of its vested rights argument.

In fact, the vested rights doctrine urged in the first action arises in part from the same constitutional provision which is the source of inverse condemnation damages. As explained in *Urban Renewal Agency* v. *California Coastal Zone Conservation Com.* (1975) 15 Cal.3d 577, 583-584: " '[O]ne who in good faith reliance upon a building permit performs substantial work and incurs substantial liability in connection therewith acquires a vested right to complete construction notwithstanding an intervening change in the law that would otherwise preclude construction. [Citations.] The rule is grounded upon the constitutional principle that property may not be taken without due process of law.' " Thus, the same primary right was at issue

in the mandate action which the developer seeks to reassert here, namely a property right to develop property by building on it and presumably to profit from it.

The developer argues that its right to damages was not and could not have been determined in the first action. Its major point is that while the mandate action was pending, such a cause of action did not exist in California law, so that it could not have been in issue. The minor point is that damages are unavailable in a mandate action.[2]

We note that the opinion in *Court House Plaza Co., supra,* 117 Cal.App.3d at pages 887-888 states: "Appellant's final argument sounds in inverse condemnation. While both the federal and state Constitutions provide that private property may not be taken or damaged for public use without payment of just compensation to its owner (Cal. Const., art I, § 19; U.S. Const., 5th Amend.), a 'mere diminution' in property value due to a zoning action is not compensable. (*Agins* v. *City of Tiburon* (1979) 24 Cal.3d 266, 273-274 . . . affd. (1980) 447 U.S. 255 . . . ." The developer argues that this statement is dictum and bad law. The City recognizes that this statement may be dictum, because damages were never in issue in the mandate action. "Whatever may be said in an opinion that is not necessary to a determination of the question involved is to be regarded as mere dictum." (*Ball* v. *Rodgers* (1960) 187 Cal.App.2d 442, 450.) Damages were never prayed for in the petition nor did the trial court reach the issue of the availability of damages for inverse condemnation.

We are unable to determine on the record before us why the prior appellate decision addressed the question of damages for inverse condemnation. No judicial notice has been requested of the briefs on the prior appeal. But res judicata does not only

---

[2]We need not determine whether inverse condemnation damages might be an alternative or additional remedy in a mandate action where a taking was found (see Code Civ. Proc., § 1095; *HFH, Ltd., supra,* 15 Cal.3d 503, 518-520), since no taking was found in the first action, thus eliminating the premise for a damage award.

preclude relitigation of issues already resolved in prior actions; it also bars splitting a single cause of action into two seriatim lawsuits. (*Mattson* v. *City of Costa Mesa* (1980) 106 Cal.App.3d 441, 446, and cases there cited.) "A party cannot by negligence or design withhold issues and litigate them in consecutive actions." (*Safeco Ins. Co.* v. *Tholen* (1981) 117 Cal.App.3d 685, 697.)

Because a cause of action had questionable validity does not mean that it should not have been raised in a prior action, however. As already explained, *Slater, supra,* 15 Cal.3d 791, 796, holds that a change in the law is no basis for avoiding the doctrine of res judicata. Thus, even if *Agins* is no longer the law (a proposition which has been rejected by *Aptos Seascape Corp.* v. *County of Santa Cruz* (1982) 138 Cal.App.3d 484, 493-494, cert. den. ____ U.S. ____, 78 L.Ed.2d 73, after consideration of some of the same authorities cited by developer here), such a change in the law would not revive a primary right previously adjudicated.

Seeking a different form of relief, of course, does not equate with enforcing a different right. In *Wulfjen* v. *Dolton* (1944) 24 Cal.2d 891, 895-896, a plaintiff was not allowed to seek damages based on fraudulent representations when she had been awarded rescission based on the same conduct in an earlier action.

CONCLUSION

The prior action determined implicitly that the City had taken no vested property right from the developer to develop by building on its property. The action is res judicata although the developer originally sought a different form of relief based on this right.

The judgment is affirmed.

/s/

Agliano, J.

WE CONCUR:

/s/

Panelli, P.J.

/s/

Brauer, J.

Court House Plaza Co. v. *City of Palo Alto*
A019076

COPY

Court of Appeal of the State of California

IN AND FOR THE

Sixth Appellate District

FILED

MAY 22 1985

Court of Appeal - Sixth App. Dist.
RICHARD J. CHAIN, Clerk

By _____ DEPUTY

COURT HOUSE PLAZA COMPANY,
Plaintiff and Appellant,

vs.

CITY OF PALO ALTO, et al.,
Defendants and Respondents.

No. A019076

Superior Court No. P33070

BY THE COURT

The Petition for Rehearing is denied.

Dated MAY 22 1985

Panelli P.J.
PANELLI, P.J.

APPENDIX C

(1) Denial of Petition for Rehearing to California Supreme Court

ROBERT E. CARTWRIGHT
CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER,
101 CALIFORNIA ST.
26TH FLOOR
SAN FRANCISCO, CA 94111

FLEHR, HOHBACH, TEST
ALBRITTON & HERBERT
1985 AUG -9 AM 9:40
RECEIVED

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 31 1985

I have this day filed Order _____

REVIEW DENIED

In re: _____ *No.* A019076

COURT HOUSE PLAZA COMPANY

vs.

THE CITY OF PALO ALTO

Respectfully,

Clerk

APPENDIX D

(1) Notice of Appeal to the Supreme Court of the United States

ROBERT E. CARTWRIGHT, ESQ.
CARTWRIGHT, SUCHERMAN, SLOBODIN
& FOWLER, INC.
101 California Street, 26th Floor
San Francisco, California 94111
Telephone: 415/433-0446

Attorneys for Petitioner and Appellant

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COURT HOUSE PLAZA COMPANY,	)	No. A019076
	)	
Petitioner and Appellant,	)	NOTICE OF APPEAL OF THE SUPREME COURT OF THE UNITED STATES
	)	
v.	)	
	)	
THE CITY OF PALO ALTO, ET AL.,	)	
	)	
Respondents.	)	

NOTICE IS HEREBY GIVEN that COURT HOUSE PLAZA COMPANY, Petitioner and Appellant above, hereby appeal to the Supreme Court of the United States from the final judgment of the State of California, entered in this action on July 31, 1981, denying a petition for review after decision by the Court of Appeal, Sixth Appellate District.

This appeal is taken pursuant to 28 U.S.C. & 1257(3).

Dated: August 16, 1985

CARTWRIGHT, SUCHERMAN, SLOBODIN
& FOWLER, INC.

By /s/
Robert E. Cartwright
Attorneys for Petitioner
and Appellant

APPENDIX E

(1) United States Constitution, Amendment V

(2) United States Constitution, Amendment XIV, Sections 1 and 5

(3) Ordinance No. 2224

(4) Zoning Code Sections of the City of Palo Alto

UNITED STATES CONSTITUTION
AMENDMENT V

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV, SECTIONS 1 and 5

United States Constitution, Amendment XIV, Sections 1 and 5:

Section 1. All persons born or naturalized in the United States, and subject to the jurisidiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ORDINANCE NO. 2224

ORDINANCE OF THE CITY OF PALO ALTO AMENDING SECTION 3.02 OF ORDINANCE NO. 1324, THE ZONING ORDINANCE, CHANGING THE ZONING OF CERTAIN PROPERTY KNOWN AS 2655, 2705 AND 2723 BIRCH STREET AND 251, 271, 276, 278, 280 AND 296 SHERIDAN AVENUE FROM R-3:P TO P-C TO ALLOW PROFESSIONAL AND COMMERCIAL OFFICES, AGENCIES AND USES

The Council of the City of Palo Alto does ORDAIN as follows:

SECTION 1. Ordinance No. 1324, the Zoning Ordinance, is hereby amended by amending Section 3.02, the "Zoning Map", by changing the zoning of certain property known as 2655, 2705 and 2723 Birch Street and 251, 271, 276, 278, 280 and 296 Sheridan Avenue from R-3:P to P-C to allow Professional and Commercial Offices, Agencies and Uses.

SECTION 2. A map describing said affected property and the zone change contemplated hereby and a Development Plan under Section 16.07 of the Zoning Ordinance are affixed hereto, marked EXHIBIT A and by reference made a part hereof.

SECTION 3. The Development Plans, Drawing No. 1 entitled "Area Map" dated 9-22-64; Drawing No. 2 entitled "Office Building Floor Plans A" dated 9-22-64; Drawing No. 4 entitled "Elevation" dated 9-24-64; Drawing No. 5R entitled "Parking Garage Floor Plan" dated 11-12-64; Drawing No. 6R entitled "Construction Phasing" dated 11-12-64 are approved with the exception of the portion of the subject property identified as "Lot Area B" known as 2601 Birch Street in accordance with the following conditions:

(1) Development Schedule

(a) Phase 1. Start of construction of the 4-story office building on "Lot Area A," and the parking garage on

"Lot Area C" within two (2) years of Council approval.

(b) Phase 2. Start of construction of the 5th to and including the 10th story on "Lot Area A" and additional levels on the parking garage on "Lot Area C" by October 31, 1976.

(2) Permitted Uses

1. Accountants
2. Advertising Agencies
3. Architects
4. Artists
5. Associations and/or Clubs
6. Attorneys
7. Banks
8. Bookkeeping and Tax Service
9. Collection Agency
10. Commercial Parking Lots and Garages
11. Consultants — management and investments
12. Contractor's offices (exclude yards)
13. Credit Service Agency
14. Dentists
15. Electronics' Representatives
16. Engineers — civil and consulting
17. Engineers — construction office, designing and development, structural office
18. Insurance — general, life, broker
19. Manufacturers' Representatives
20. Physicians and Surgeons
21. Psychologists
22. Publishers — (general office)
23. Real Estate — appraisers, brokers, consultants
24. Research — general offices, marketing, consultants
25. Restaurant

26. Savings and Loan Companies
27. Secretarial Services — light printing
28. Social Clubs
29. Tabulating — statistical
30. Title companies

(3) Structures

Building location, dimensions, heights and other improvements shall be substantially as indicated on the approved Development Plan.

(4) Site

Lot coverage, open area, landscaping and access driveways shall be substantially as indicated on the approved Development Plan.

(5) Off-Street Parking

There shall be one (1) off-street parking space for each one hundred forty-four (144) square feet of net usable floor area of the ground floors and one (1) parking space for each two hundred eighty-eight (288) square feet of net usable floor area on upper floors. Minimum dimension of parking spaces, aisle and access space shall be as provided in Section 4.51 of the Zoning Ordinance, except that the minimum width of each parking space shall be nine (9) feet.

SECTION 4. This ordinance shall become effective upon the expiration of thirty days from its passage.

INTRODUCED: December 14, 1964

PASSED: December 28, 1964

AYES: Arnold, Beahrs, Byxbee, Comstock, Cooley, Dias, Porter, Rodgers, Rohrs, Rus, Woodward, Zweng.

NOES: Debs, Flint.

ABSENT: Cresap.

ATTEST:

/s/ Shirley Kilgore
City Clerk, Acting

APPROVED:

/s/ B. Woodward
Mayor

APPROVED AS TO FORM:

/s/ Robert E. Michalski
City Attorney

APPROVED AS TO CONTENT:
/s/ Louis J. Fourcroy
Planning Department

Change of District for Property at 2655, 2705, and 2723 Birch Street and 251, 271, 276, 278, 280, and 296 Sheridan Avenue - 9-17-64.

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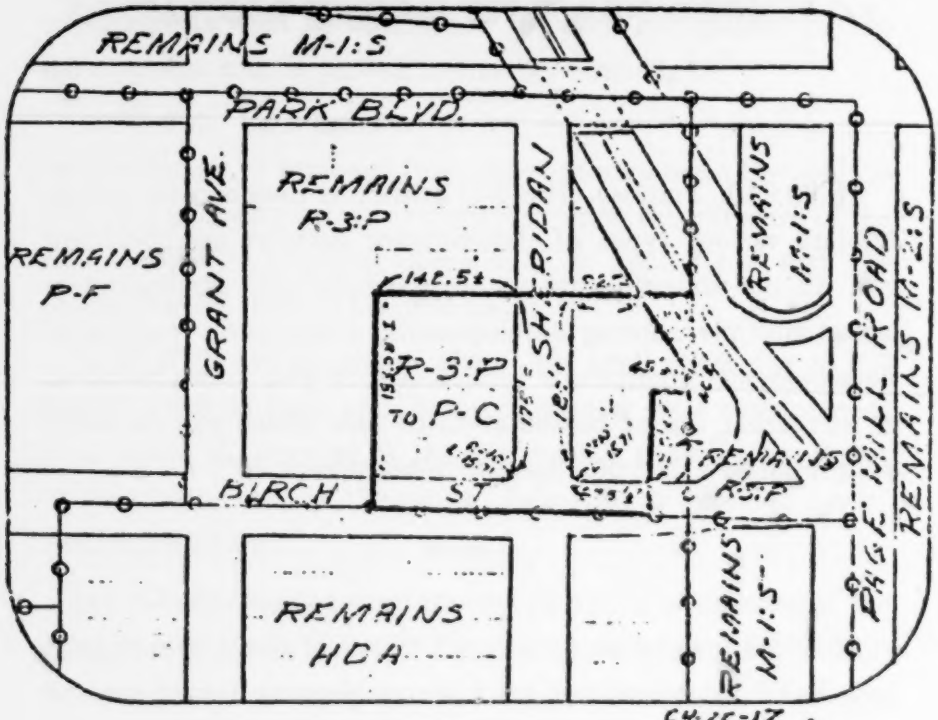

POSTED 100' SCALE ZONE MAP
600 " " "
200 " OFFICIAL MAP
200 " LAND USE MAP

ZONING CODE SECTIONS OF THE CITY OF PALO ALTO

Chapter 18.68
P-C PLANNED COMMUNITY DISTRICT REGULATIONS

*****

18.68.010 Purpose. The P-C district is designed to accommodate various types of development such as neighborhood and district shopping centers, professional and administrative areas, multiple housing developments, single-family residential developments, commercial service centers and industrial parks or any other use or combination of uses which can be made appropriately a part of a planned development.

*****

18.68.030 Uses permitted. All and any uses are permitted in a P-C district provided such use or uses are shown on the development plan for the particular P-C district as approved by the city council. *****

18.68.040 Uses requiring use permits. A use permit shall be required for any and all uses in a P-C district *****. Upon payment of the fee required by Section 18.90.040 for use permits, a use permit shall be issued without a public hearing if the proposed structure or structures comply with the development plan and conditions thereof. The zoning administrator may impose additional conditions and requirements on the use permit as he deems necessary to secure the purposes of this title and the approved development plan. If the applicant is

aggrieved by the action of the zoning administrator through his denial of the use permit or conditions imposed thereon, he may appeal such denial or conditions under the procedures set forth in Chapter 18.92. *****

18.68.050 Height and space requirements. Maximum height and bulk and minimum setback, yard, parking and loading requirements shall be established for each P-C district by the development plan approved by the city council. *****

18.68.060 Establishment of P-C districts. P-C districts may be established or removed from the zone map upon the application of a property owner or owners or upon the initiative of the city council or planning commission in accordance with the procedures set forth in Chapter 18.98. *****

18.68.070 Development plan. An application for a P-C district shall include and be accompanied by a development plan which, if approved by the city council, shall become a part of the zoning map of the city of Palo Alto as provided for by Section 18.08.040.

(a) Changes in the development plan shall be considered the same as changes in the zoning map and shall be made in accordance with the procedures set forth in Chapter 18.98 of this title, except that such change may be accomplished by city council resolution rather than the passage of an ordinance or, when applicable, by the final decision of the director of planning, pursuant to Chapter 18.99 of this title, for administrative approval of minor changes in projects.

(b) The development plan shall include:

(1) A map showing any street systems and lot design proposed within the district. *****

(4) A plot plan for each building site or sites in the proposed P-C district or any portion thereof, as required by the

zoning administrator. ***** The required plot shall show the approximate location of all proposed buildings, indicating maximum and minimum distances between buildings and between buildings and property or building site lines, and shall indicate the general location and type of landscaping. *****

(a) Off-street parking and loading plan.*****

(6) Elevations and/or perspective drawings of all proposed structures *****. Such drawings need not be the result of final architectural decisions and need not be in detail. The purpose of such drawings is to indicate, within stated limits, the height of proposed buildings and the general appearance of the proposed structures to the end that the entire development will have architectural unity.*****

18.68.080 Development schedule. A. An application for a P-C district shall be accompanied by a development schedule indicating to the best of the applicant's knowledge the approximate date on which construction of the project can be expected to begin, the anticipated rate of development and completion date. The development schedule, if approved by the city council, shall become a part of the development plan and shall be adhered to by the owner of the property in the P-C district and his successors in interest.

B. From time to time the zoning administrator shall compare the actual development accomplished in the various P-C districts with the approved development schedules and shall report his findings to the planning commission.

C. If in the opinion of the planning commission the owner or owners of property in P-C districts are failing or have failed to meet the approved development schedule, the commission may initiate proceedings under Chapter 18.98 to remove the P-C district from the zoning map or to amend the development plan.

D. For good cause shown by the property owner in writing, prior to the expiration of the original time schedule for the development, the planning commission, without a public hearing, may recommend a change or extension of the time limits imposed by the development schedule. Upon receipt of the recommendation of the planning commission, the city council may change or extend the time limits imposed by the development schedule. *****

Chapter 18.90
VARIANCES AND USE PERMITS

*****

18.90.050 Public hearing—Time of hearing. Upon the filing of such application, the zoning administrator shall set the matter for public hearing and such hearing shall be within thirty days of the filing of such application. *****

18.90.060 Public hearing—Notice. (a) A notice of such hearing shall be mailed to the applicant, and to each occupant and person to whom is assessed the property within two hundred fifty feet of the exterior limits of the property involved. *****

18.90.070 Public hearing—Decision. At the time and place set for such hearing the zoning administrator shall hear evidence for and against such application, shall make findings and shall take such action as in his opinion is indicated by such evidence. Each hearing shall be open to the public. He may continue from time to time any hearing held by him. A decision shall be rendered by the zoning administrator within ten days after conclusion of the hearing, ***** (Ord. 1521 (part), 1954: Ord. 1324 *****

18.90.090 Grounds for granting variance. A. Granting Variance. The zoning administrator may grant a variance from the area, height, yard and space requirements of this title if, from the application or the facts presented at the public hearing, he finds:

(1) There are exceptional or extraordinary circumstances or conditions applicable to the property involved that do not apply generally to property in the same district; and

(2) The granting of the application is necessary for the preservation and enjoyment of a substantial property right of the applicant and to prevent unreasonable property loss or unnecessary hardship and will not be detrimental nor injurious to the property or improvements of other owners of property; and

(3) The granting of the application will not be detrimental to the public welfare or convenience.

In granting such variance the zoning administrator may impose such reasonable conditions or restrictions as he deems appropriate or necessary to protect the public health, safety or welfare.

B. Variance from Setback Ordinance. The zoning administrator may grant a variance from the requirements of the setback ordinance, if facts presented in the application or at the public hearing support both paragraphs (2) and (3) of subsection A of this section. (Ord. 1914 (part), 1960: Ord. 1521 (part), 1954: Ord. 1324 § 23.09, 1951).

18.90.120 Revocation—Extension. *****

A use permit or a variance which has not been used within one year after the date of granting thereof becomes null and void and of no effect unless specifically issued for a longer time period. The zoning administrator may, without a hearing, extend such time for an additional year only upon application filed with him before the expiration of the first year. *****

Chapter 18.92
APPEALS

*****

18.92.010 Appeal. An appeal may be taken to the planning commission by any person, firm or corporation aggrieved or affected by any determination of the zoning administrator. *****

18.92.020 Filing—Procedure. An appeal shall be in writing and filed in duplicate with the city clerk within ten days after the mailing of notice of the decision of the zoning administrator. *****

18.92.030 Hearing date—Notice. Upon receipt of the appeal, the city clerk shall set the appeal for hearing at a meeting of the planning commission to be held for such purpose not more than four months thereafter. Notice of such hearing shall be given in the same manner as provided in Chapter 18.90 for notice of hearing by the zoning administrator. *****

18.92.040 Stay of proceedings. Filing of an appeal shall stay all proceedings in furtherance of the action appealed from until the determination of the appeal as provided herein. *****

18.92.050 Hearing on appeal. Upon the date set therefor the planning commission shall hold a public hearing of the appeal unless, for cause, the commission shall on that date continue the matter. Upon the hearing of such appeal the commission shall hear evidence, make findings and recommend to the city council that the decision appealed from be affirmed, changed or modified, or in lieu thereof, make such other or additional recommendations as it shall deem proper in the premises, subject to the same limitations as are placed on the zoning administrator by this title. *****

18.92.060 Recommendation to city council. The findings of the planning commission shall be submitted in the form of a recommendation to the council and placed on the agenda of the next regular council meeting by the city clerk. *****

18.92.070 Action by city council. Upon the receipt of the recommendation of the planning commission the city council may, if it so desires, hold a public hearing of the matter in the same manner as provided for public hearings by the zoning administrator, or may consider the appeal without a hearing. In conformity with the provisions of this title, the council may by motion reverse or affirm wholly or partly, or may modify any decision, determination or requirement of the commission and may make such decision or determination or may impose such conditions as the facts warrant, and its decision or determination shall be final. *****

Chapter 18.98
AMENDMENTS, ALTERATIONS, CHANGES IN DISTRICTS

*****

18.98.010 Conditions requiring zone changes. This title may be amended by changing the boundaries of districts or by changing any other provision thereof whenever the public interest, health, safety, morals, peace, comfort, convenience or general welfare may so require. *****

18.98.020 Manner of initiating. Changes in the district boundaries may be initiated as follows:

(a) By motion of the city council on its own initiative;

(b) By motion of the planning commission on its own initiative; or

(c) By application of a property owner. *****

18.98.030 Application by property owner. An application for a change of district may be made by a record owner of the parcel of property for which a change is sought or by a purchaser thereof under a contract in writing duly executed and acknowledged by both the buyer and the seller, by a lessee in possession thereof, with the written consent of the owner of record of the legal title to make such application, or by the agent of any of the foregoing, duly authorized in writing. The application must be in writing on a form supplied by the division of planning. *****

18.98.060 Notice of public hearing. The planning commission shall give notice of the time and place of such hearing and the purpose thereof *****

18.98.070 Public hearing. ***

The recommendation of the commission to the council shall be in writing and shall set forth fully the findings and determinations of the commission on the matter involved. A decision shall be rendered within a reasonable time and a recommendation shall be filed with the council within seven days after the decision is rendered by the planning commission. *****

18.98.080 Powers of the city council upon recommendation. Upon receipt of the recommendation of the planning commission as provided herein, the city council shall consider the same and may change or refuse to change the classification of any property as requested or recommended and its decision thereon shall be final and conclusive. If the city council so desires it may hold a public hearing on the matter in the same manner as provided in Section 18.98.070 hereof where applicable. If the classification of any property is to be changed an ordinance shall accordingly be passed and thereupon the zoning administrator shall change the official zoning map in conformity therewith. *****

18.98.090 Initiative of the city council or the planning commission. The city council may, be a minute order, request the planning commission to consider any property; or the planning commission may, of its own initiative, consider such a change. In either case the planning commission shall proceed as though an application for change had been filed with the planning department as provided in Section 18.98.030 hereof. *****

Chapter 18.99
ADMINISTRATIVE APPROVAL OF MINOR CHANGES IN PROJECTS

*****

18.99.010 Purpose of chapter. The purpose of this chapter is to provide a uniform and orderly procedure for expeditious administrative approval of minor changes to existing projects and plans. (Ord. 2927 § 1 (part), 1976.)

18.99.020 Definition of minor change. "Minor change" means an alteration or modification of an existing plan, development or project which is inferior in bulk, degree, or importance to the overall dimension and design of the plan, development, or project, with no change proposed for the use of the land in question, no change proposed in the character of the structure or structures involved, and no exception or variance required. (Ord. 2927 § 1 (part), 1976.)

18.99.030 Applicability of chapter. (a) Type of applications. This chapter shall apply to applications for a minor change to the following:

(1) An approved development plan for a planned community district pursuant to Chapter 18.68 of this title; *****

APPENDIX F

(1) Inter-office Communication of the City of Palo Alto of February 3, 1979

(2) Letter of City of Palo Alto of May 23, 1968, by Donald G. Meaney, Assistant City Attorney

CITY OF PALO ALTO
INTER-OFFICE COMMUNICATION

To: City Manager Date: February 3, 1970

From: Sr. Assistant City Attorney Department:

SUBJECT: California Lands Building
260 Sheridan Avenue

Please find attached a copy of a letter which is being sent to Mr. Dunn concerning the smokeshaft problem regarding the above reference property. Mr. Dunn, his architect, Mr. Hoover, and his attorney, Mr. Cliff, have agreed to those conditions.

As you know, this rulling comes from this office on the basis that Ordinance 2224 contemplated the 10 story building with an interior smokeshaft and the development plan attached to the ordinance specifically shows a 10 story building with no exterior smokeshaft. This understanding was confirmed by Mr. Keithley's letter of June 4, 1965. Therefore, it would appear that certain rights vested. Those rights are with respect to a building with an interior smokeshaft, which building is unsprinklered. It should be noted here that henceforth all P-C ordinances, most particularly those which contemplate development in phases, will include language similar to or identical with the following:

> "All construction under this ordinance shall be in accordance with applicable building and fire codes in effect at the time that the building permit for each phase of building is issued."

We are confident that this language would eliminate any future problems of a similar nature.

PETER G. STONE

PGS.rb
cc: Chief Building Official
Assistant Building Official
Assistant Fire Chief
Fire Marshal

Office of the City Attorney May 23, 1968

Mr. W. G. Dunn
California Lands Investment Company
430 Cambridge Avenue
Palo Alto, California

Re: City of Palo Alto Resolution No. 4113
(P-C Development for Property Known as
260 Sheridan Avenue - Palo Alto).

Dear Mr. Dunn:

In answer to the question from your lender, the offset of violation of the Development Schedule in the P-C plan, as amended by Resolution No. 4113, simply means that the Development Plan would become defunct and that before any construction is undertaken, application must be made for an amendment extending the Development Schedule.

Thus, in the sense that compliance with the Development Plan is necessary to avoid its lapse, construction of the permanent structure must start on or before October 21, 1976. However, this does not mean that the City of Palo Alto has any right, either under its own municipal code or under State law, to require specific performance on the developer in the form of construction of the building, or to sue for damages.

The lapse of the Development Plan can be prevented by applying for an extension of the Development Schedule if necessary. While this letter should not and cannot be construed as a commitment on the part of the City of Palo Alto to grant such further extensions, inasmuch as this authority is vested in the City Council, these extensions have, in fact, customarily been granted. The reason for this is simply that the City is not any more interested than the owners in having a development remain half completed.

The date in the Resolution coincides with the date for commencement of construction of the rest of the stories of the office building itself. Thus, the only real and practical effect of failure to start building the parking structure according to the Development Schedule in Resolution No. 4113 is to cause the *entire second phase portion* of the Development Plan to lapse,

so that if any more construction is undertaken, it would be after a new Development Schedule of both buildings satisfactory to the City.

Very truly yours,
JAMES A. HILDEBRAND
City Attorney

BY DONALD G. MEANEY
Assistant City Attorney

BSM:km

cc: Planning Officer
City of Palo Alto